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Public Bank Bhd v Lee Kin Mio & Anor

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 1–24–457 OF 2003

B LOW HOP BING J

6 JANUARY 2006

Civil Procedure — Judgments and orders — Setting aside — Order for sale — Whether there was irregularities in application for order for sale and affidavits filed in support — Whether irregularities would entitle defendants to set aside order for sale — Rules of the High Court 1980 O 10 r 1(1), O 83 r 2(3), (4) and Interpretations Acts 1948 and 1967 s 12

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D

Civil Procedure — Service — Whether there was failure to serve notice of adjourned hearing date — Whether constituted contravention of fundamental rule of natural justice — Service by AR Registered Post — Whether notice was served not less than two clear days — Whether there was failure to endorse affidavit — Whether defendants aware of essential statutory particulars of plaintiff's claim — Whether there was substantial miscarriage of justice — Rules of the High Court 1980 O 10 r 1(1), O 83 r 2(3), (4) and Interpretations Acts 1948 and 1967 s 12

E

F The plaintiff had filed an originating summons against the defendants for an order for sale of the land held under PT 476 HS(D) 2045 in the mukim of Sungai Baru Ilir, district of Alor Gajah ('the land'). After service of the originating summons on both the defendants at the first defendant's address, both the defendants had effected a partial repayment towards their account with the plaintiff, with a view to an amicable settlement by way of undertaking to effect payment of further instalments. The defendants had filed no affidavit in objecting to the plaintiff's originating summons. This was the defendants' application for an order, inter alia, that the order for sale be set aside and that all proceedings thereto be stayed.

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H **Held**, dismissing the application:

(1) The law contained in O 83 r 2(4) of the Rules of High Court 1980 ('the RHC') which had been clearly settled was that where the notice of adjourned hearing had not been served on the defendant to a charge action, it constituted a contravention of the fundamental rule of natural justice, ie *audi alteram partem* and so the order for sale granted thereby would be a nullity. The notice of adjourned hearing, as in the case of the notice of original hearing, had been served on both the defendants at the first defendant's address, as both the defendants were relatives. Pursuant to the notice of original hearing, both the defendants had taken the above substantive steps to effect an amicable settlement with the plaintiff by way of the partial repayment with an

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undertaking to effect payment of further instalments. The defendants should not now be heard to say that while they were aware of the notice of original hearing, they were however unaware of the notice of adjourned hearing. There had been no breach of the *audi alteram partem* rule (see paras 14–15).

(2) The plaintiff had fulfilled the requirement of not less than two clear days under O 83 r 2(4) of the RHC. The notice of adjourned hearing was dated 23 November 2003 and was sent by AR registered post. This service by post was expressly authorised by O 10 r 1(1) of the RHC. Under s 12 of the Interpretation Acts 1948 and 1967, where a written law authorises postal service, then unless the contrary is proved, service shall be presumed to have been effected at the time when the letter would have been delivered, in the ordinary course of post. Hence, from 23 November 2003 to 26 November 2003 (hearing date), two clear days had elapsed. The plaintiff had fulfilled the requirement under O 83 r 2(4) of the RHC (see paras 16, 19).

(3) The defendants' claim that the plaintiff had not complied with O 83 r 2(3) of the RHC by reason of the failure to indorse on the outside fold of the copy of the affidavit served on the defendant a notice informing the defendant to the effect, was highly technical. Rules of court provide for vehicles for the purposes of obtaining the necessary prayers according to the rights and obligations of the parties under the law. These rules should not be rendered ineffective by highly technical objections (see paras 20, 24).

(4) Under O 2 r 3 of the RHC, a court or judge shall not allow any preliminary objection by any party to any cause, matter or proceedings only on the ground of non-compliance with any of the provision of the RHC unless the court or judge is of the opinion that such non-compliance had occasioned a substantial miscarriage of justice (see para 26).

(5) The defendants had at all times been aware of the undisputed factual background including the outstanding sum and the interest as stated in the plaintiff's affidavits which had provided most of the essential statutory particulars, thereby occasioning no prejudice nor any substantial miscarriage of justice to the defendants (see para 41).

[Bahasa Malaysia summary

Plaintif telah memfailkan satu saman pemula terhadap defendan-defendan untuk satu perintah jualan tanah yang dipegang di bawah PT 476 HS(D) 2045 dalam mukim Sungai Baru Ilir, daerah Alor Gajah ('tanah tersebut'). Selepas penyampaian saman pemula ke atas kedua-dua defendan di alamat defendan pertama, kedua-dua defendan telah membuat bayaran balik separa ke dalam akaun mereka bersama plaintif, dengan hasrat untuk menyelesaikannya dengan aman dan berusaha akan membuat bayaran ansuran seterusnya. Defendan-defendan tidak memfailkan afidavit membantah saman pemula plaintif. Ini adalah permohonan defendan-defendan untuk satu perintah, antara lain, bahawa perintah jualan diketepikan dan semua prosiding digantung.

Diputuskan, menolak permohonan tersebut:

(1) Undang-undang yang terkandung dalam A 83 k 2(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang nyata tetap adalah bahawa di mana notis untuk menangguhkan perbicaraan tidak disampaikan ke atas defendan terhadap satu tindakan, ia membentuk satu percanggahan rukun am keadilan asasi, iaitu *audi alteram partem* dan oleh itu perintah jualan yang diberikan adalah terbatal. Notis penangguhan perbicaraan, seperti dalam kes notis perbicaraan asal, telah disampaikan ke atas kedua-dua defendan di alamat defendan pertama, memandangkan kedua-dua defendan bersaudara. Menurut notis perbicaraan asal, kedua-dua defendan telah mengambil langkah-langkah substantif seperti di atas untuk mencapai satu penyelesaian secara aman dengan plaintif melalui bayaran balik separa dengan usaha membuat bayaran ansuran seterusnya. Defendan-defendan tidak patut didengar sekarang untuk mengatakan bahawa meskipun mereka sedar tentang notis perbicaraan asal tersebut namun mereka tidak sedar tentang notis penangguhan perbicaraan itu. Tidak berlaku perlanggaran rukun *audi alteram partem* (lihat perenggan 14–15).

(2) Plaintif telah memenuhi keperluan tidak kurang daripada dua hari lapang di bawah A 83 k 2(4) KMT. Notis penangguhan perbicaraan bertarikh 23 November 2003 dan telah disampaikan melalui pos berdaftar AR. Penyampaian ini melalui pos dengan nyata diperuntukkan oleh A 10 k 1(1) KMT. Di bawah s 12 Akta Tafsiran 1948 dan 1967, di mana undang-undang bertulis memperuntukkan perkhidmatan pos, maka kecuali yang bertentangan dibuktikan, perkhidmatan hendaklah dianggap telah dilaksanakan pada masa apabila surat tersebut patut disampaikan, dalam cara pos biasa. Justeru itu, daripada 23 November 2003 hingga 26 November 2003 (tarikh perbicaraan), dua hari lapang telah berlalu. Plaintif telah memenuhi keperluan di bawah A 83 k 2(3) KMT (lihat perenggan 16, 19).

(3) Dakwaan defendan-defendan bahawa plaintif tidak mematuhi A 83 k 2(3) KMT atas sebab kegagalan untuk mengindorskan di bahagian luar kulit salinan afidavit yang disampaikan ke atas defendan satu notis memaklumkan defendan berkenaannya, amat teknikal. Kaedah-kaedah mahkamah memperuntukkan untuk kenderaan bagi tujuan memperoleh permohonan-permohonan yang perlu menurut hak dan kewajipan pihak-pihak di bawah undang-undang. Kaedah-kaedah tersebut tidak patut dianggap tidak efektif oleh bantahan-bantahan teknikal (lihat perenggan 20, 24).

(4) Di bawah A 2 k 3 KMT, mahkamah atau hakim tidak patut membenarkan apa-apa bantahan awal oleh mana-mana pihak untuk apa-apa sebab, perkara atau prosiding hanya atas alasan ketidakpatuhan mana-mana peruntukan KMT kecuali jika mahkamah atau hakim itu berpendapat bahawa ketidakpatuhan sedemikian telah mengakibatkan berlakunya ketidakadilan substantif (lihat perenggan 26).

(5) Defendan-defendan pada setiap masa matan sedar tentang latar belakang faktual yang tidak dipertikaikan itu termasuklah baki jumlah dan faedah seperti yang dinyatakan dalam afidavit-afidavit plaintif-plaintif yang telah memberikan kebanyakan daripada butiran statutori yang penting, yang tidak menyebabkan apa-apa prejudis mahupun apa-apa ketidakadilan substantif terhadap defendan-defendan (lihat perenggan 41).]

Notes

For a case on notice under O 83 of the Rules of the High Court 1980, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index, see para 5529.

Cases referred to

Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd [1993] 1 MLJ 283 (refd)

Bank Bumiputra Malaysia Berhad (Shah Alam) v Wee Chye Luan & Anor [2001] 1 AMR 700 (refd)

Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor [1995] 2 MLJ 537 (refd)

Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh [2005] 7 CLJ 1 (refd)

Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan [2002] 6 MLJ 134 (refd)

Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd [2003] 3 MLJ 321 (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)

Diamond Peak Sdn Bhd v United Merchant Finance Bhd [2003] 2 MLJ 346 (refd)

Feedmeal Malaysia Sdn Bhd v Teh Cho Yeow & Ors [2003] 6 MLJ 19 (refd)

HongKong Bank (M) Bhd v William Tan Enterprise Sdn Bhd [1999] 3 MLJ 293 (refd)

Malayan Banking Berhad v Dagang Bina Sdn Bhd [1991] 3 CLJ 1739 (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)

Megnaway Enterprise Sdn Bhd v Soon Lian Hock [2003] 5 CLJ 103 (refd)

Mokhtar bin Amin v Mohamed Mokhtar bin Omar [2001] 4 MLJ 329 (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374 (refd)

Overseas Union Bank (M) Bhd v L & L Properties Sdn Bhd [1999] 2 MLJ 637 (refd)

Pengkalen Concrete Sdn Bhd v Chow Mooi (Guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor [2003] 3 MLJ 67 (refd)

R v Immigration Tribunal; ex parte Jeyeanthan [1999] 3 All ER 231 (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 12
Rules of the High Court 1980 O1A, O 3 r 2(3), O 10 r 1(1), O 83 r 2(3), (4), 3

Sailaja Ramakrishan (S Ramakrishan & Partners) for the defendant.

Ramani Krishnan (Sabarudin Othman & Ho) for the plaintiff.

Low Hop Bing J:

APPLICATION

[1] This is the defendants' application by way of summons in chambers in encl (17) for an order, inter alia, that the order for sale granted by this court on 26 November 2004 be set aside and that all proceedings thereto be stayed.

FACTUAL BACKGROUND

[2] The plaintiff had on 25 October 2003 filed originating summons in encl (1) against the defendants for an order for sale of the land held under PT 476 HS(D) 2045 in the mukim of Sungai Baru Ilir, district of Alor Gajah ('the land').

[3] After service of the originating summons on both the defendants at the first defendant's address, both the defendants had in March 2004 effected a partial repayment of RM25,000 towards their account with the plaintiff, with a view to an amicable settlement by way of undertaking to effect payment of further instalments.

[4] The defendants had filed no affidavit in objecting to the plaintiffs originating summons.

[5] On the original hearing date, 12 May 2004, the hearing was adjourned as on that day I had to attend a meeting at the Legal Profession Qualifying Board in connection with the Certificate in Legal Practice examination. The court has rescheduled the hearing date to 12 August 2004 and had by notice addressed to, inter alia, both the defendants, informing them of the new hearing date.

[6] As the matter was pending the aforesaid settlement, hearing of the originating summons was adjourned to 26 November 2004; and notice of hearing was served on both the defendants by way of AR registered post.

[7] On 26 November 2004 which was the adjourned date of hearing, the defendants were not present and so an order for sale was made in respect of the land.

SERVICE OF APPOINTMENT OF HEARING

[8] Miss Sailaja Ramakrishnan, learned counsel for the defendants, submitted that the notice of appointment of hearing on 12 May 2004 has been served on both the defendants on 10 January 2004 at the first defendant's address at No 73, Paya Mengkuang, 78300 Masjid Tanah, Melaka, ('first defendant's address') although the said notice contains the second defendant's address for service at No 29, Paya Mengkuang 78300 Masjid Tanah Melaka. She added that the letter informing the defendants of the new date of hearing on 26 November 2004 was vide notice dated 23 November 2004 which was also served at the first defendant's address, thereby failing to comply with O 83 r 2(4) of the Rules of the High Court 1980 ('the RHC').

The following authorities were referred to:

(1) *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283 (HC);

(2) *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 (FC); and

(3) *Bank Bumiputra Malaysia Berhad (Shah Alam) v Wee Chye Luan & Anor* [2001] 1 AMR 700 (HC).

[9] Plaintiff's learned counsel, Miss Ramani Krishnan,stated that although the notice of appointment of hearing has been served on the first defendant's address on 10 January 2004, the second defendant was nevertheless aware of the date of hearing on 12 May 2004 and the adjourned date of hearing on 26 November 2004 as both the defendants are relatives who had in March 2004 effected a partial repayment of RM25,000 for purposes of an amicable settlement, adding that the plaintiff has complied with O 83 r 2(4) of the RHC.

[10] In my judgment, a good starting point is to refer to O 83 r 2(4) which reads:

> O 83 r 2
>
> (4) Where the hearing is adjourned, then, subject to any directions given by the Court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing.

[11] Order 83 r 2(4) was considered by James Foong J (now JCA) in *Kimden Housing Development Sdn Bhd* where the plaintiff had failed to inform the defendants of the new hearing date, and so it was held that O 83 r 2(4) has not been complied with.

[12] Another case in which O 83 r 2(4) was considered is *Muniandy* where the defendants had not been served with a notice of the adjourned hearing under that order and rule. The first instance judge held that failure to serve the notice was an irregularity. The Federal Court speaking through Edgar Joseph Jr FCJ (as he then was) allowed the appeal by the defendants and at pp 381I–383D, held, inter alia, as follows:

(1) O 83 r 2(4) has a common law content, ie a statutory enunciation of the fundamental rule of natural justice as expressed in the Latin maxim *audi alteram partem* (hear the other side) so that the obligation to serve notice of the adjourned hearing remained even if O 83 r 2(4) did not apply;

(2) Merely 'sending' a notice without any proof of posting the notice is a far cry from 'serving' a notice, in the absence of a deeming clause in the contract of the loan or the annexure to the charge; and

(3) The effect of failure on the part of the chargee to notify the chargor of the date of the adjourned hearing was of such fundamental importance as to render an exparte order a nullity.

[13] The above judgment was followed by Idris Yusoff J in *Wee Chye Luan*, where again the notice of adjourned hearing was not served on the first respondent, the registered proprietor, in a charge action. The learned judge held that O 83 r 2(4) has not been complied with.

[14] In my view, the law contained in O 83 r 2(4) which has been clearly settled in the aforesaid three authorities is that where the notice of adjourned hearing had not been served on the defendant to a charge action, it constituted a contravention of the fundamental rule of natural justice, ie audi alteram partem and so the order for sale granted thereby would be a nullity.

[15] It is pertinent to point out that the undisputed facts of the case before me reveal that the notice of adjourned hearing, as in the case of the notice of original hearing, has been served on both the defendants on 23 November 2004 at the first defendant's address, as both the defendants are relatives. Pursuant to the notice of original hearing, both the defendants have taken the above substantive steps to effect an amicable settlement with the plaintiff by way of the partial repayment of the sum of RM25,000 with an undertaking to effect payment of further instalments, which obviously the defendants have defaulted. They cannot now be heard to say that while they were aware of the notice of original hearing, they are however unaware of the notice of adjourned hearing. In my view, there has been no breach of the *audi alteram partem* rule.

[16] For the purpose of ascertaining whether the plaintiff has fulfilled the requirement of not less than two clear days under O 83 r 2(4), it is to be noted that there has been no dispute that the notice of adjourned hearing was dated 23 November 2003 and was sent by AR registered post. This service by post is expressly authorised by O 10 r 1(1). Under s 12 of the Interpretation Acts 1948 and 1967, where a written law authorises postal service, then unless the contrary is proved, service shall be presumed to have been effected at the time when the letter (in this case, I would add, includes the said notice) would have been delivered, in the ordinary course of post (see also *Pengkalen Concrete Sdn Bhd v Chow Mooi (Guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67 per Suriyadi J).

[17] The defendants' submission did not explain how the non-fulfilment of the two clear days requirement had arisen.

[18] In my view, the reckoning of not less than 'two clear days' under O 83 r 2(4) should be effected pursuant to O 3 r 2(3) which provides as follows:

> Where the act is required to be done within or not less than a specified period before a specified period, the date ends immediately before that date.

[19] Hence, from 23 November 2003 to 26 November 2003, two clear days had elapsed, in which case, I hold that the plaintiff has fulfilled the requirement under O 83 r 2(4) of the RHC.

INDORSEMENT ON THE OUTSIDE FOLD OF AFFIDAVIT

[20] It was argued for the defendants that the plaintiff claiming delivery of possession of the land has not complied with O 83 r 2(3) by reason of the failure to indorse on the outside fold of the copy of the affidavit served on the defendant a notice informing the defendant to the effect. Support was sought in *Kimden Housing Development Sdn Bhd*.

[21] The plaintiff responded that it was seeking an order for sale and so failure as alleged above is not fatal, citing, inter alia, O 1A.

[22] My perusal of the plaintiffs originating summons leads me to the conclusion that the plaintiff was seeking an order for sale of the land in order to recover the sum of RM225,905.90 as at 31 August 2003 and the words 'delivery of possession' (or 'penyerahan milikan') were never included in any of the prayers, in which case I am of the view that the submission advanced for the defendants is somewhat misconceived.

[23] While it is true that in *Kimden Housing Development Sdn Bhd*, James Foong J (now JCA) has at p 286D held that O 83 r 2(3) has not been complied with by the plaintiff whose originating summons therein has sought vacant possession, the position before me is different in that the plaintiffs claim contains no corresponding prayer.

[24] The point raised for the defendants is highly technical. Rules of court provide for vehicles for the purposes of obtaining the necessary prayers according to the rights and obligations of the parties under the law. These rules should not be rendered ineffective by highly technical objections.

[25] In *Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh* [2005] 7 CLJ 1 at p 5, where the issue raised for the defendant therein was highly technical in nature which has not occasioned a substantial miscarriage of justice, I invoked O 1A which came into force on 16 May 2002. Order 1A provides that in administering any of the rules herein, the court or a judge shall have regard to the justice of the case and not only to the technical non-compliance with any of the rules herein.

[26] Under O 2 r 3 of the RHC, a court or judge shall not allow any preliminary objection by any party to any cause, matter or proceedings only on the ground of non-compliance with any of the RHC unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice: see also *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 (FC); *Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan* [2002] 6 MLJ 134 (HC); *Megnaway Enterprise Sdn Bhd v Soon Lian Hock* [2003] 5 CLJ 103 (HC); *Terrance Simon Marbeck v Kerajaan Malaysia* [2003] 6 CLJ 120 (HC); and *Feedmeal Malaysia Sdn Bhd v Teh Cho Yeow & Ors* [2003] 6 MLJ 19 (HC).

STATEMENT OF ACCOUNTS

[27] According to defendants' learned counsel, the plaintiffs affidavit in support has failed to comply with O 83 r 3(3), (6) and (7) in relation to the particulars

thereunder ('the statutory particulars') and the interest claimed by the plaintiff was not in accordance with the charge and so the order should be set aside, along the line of authorities viz *Kimden Housing Development Sdn Bhd*; *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 60S HC; *Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor* [1995] 2 MLJ 537 (HC); *Overseas Union Bank (M) Bhd v L & L Properties Sdn Bhd* [1999] 2 MLJ 637 (HC); and *HongKong Bank (M) Bhd v William Tan Enterprise Sdn Bhd* [1999] 3 MLJ 293 (HC).

[28] The plaintiff contended that the statutory particulars have been provided and have led to the partial repayment by the defendants of RM25,000 for the purposes of an amicable settlement followed by their undertaking to repay further instalments. *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321 (CA); and *Mokhtar bin Amin v Mohamed Mokhtar bin Omar* [2001] 4 MLJ 329 (CA) were cited in support.

[29] In my judgment, this issue may be resolved by a careful consideration of O 83 r 3(3), (6) and (7) which are reproduced as follows:

> In my judgment, this issue may be resolved by a careful consideration of O 83 r 3(3), (6) and (7) which are reproduced as follows:
>
> (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of
>
> (a) the amount of the advance;
>
> (b) the amount of the repayments;
>
> (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
>
> (d) the amount remaining due under the charge;
>
> (4)…;
>
> (5)…;
>
> (6) Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).
>
> (7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

[30] For this purpose, it is to be noted that in *Kimden Housing Development Sdn Bhd*, the plaintiff's first affidavit stated the amount to be owing as at 25 April 1986 while the affidavit was affirmed on 30 June 1986. James Foong J (now JCA) held that it was in contravention of O 83 r 3(3)(c).

[31] In the same case, the plaintiffs' affidavits never stated 'the amount of a day's interest' and so O 83 r 3(7) was not complied with. By reason of the above, and following *Malayan Banking Berhad v Dagang Bina Sdn Bhd* [1991] 3 CLJ 1739, the

learned judge held that the defendant was deprived of the knowledge of the amount outstanding and interest due under the charge, which led to the setting aside of the order for sale.

[32] The judgment in *Kimden Housing Development Sdn Bhd*, must be read in juxtaposition with that in *Citibank NA v Ibrahim bin Othman*, where the defendant claimed that the plaintiff had failed to provide the statutory particulars in the first affidavit in support of its application, viz., the amount of the advance and the rate at which interest had been calculated. Mahadev Shankar J (later JCA) held, inter alia, that the plaintiff had applied for an order for sale in order to effect repayment of moneys secured by a charge and, on a reading of O 83 rr 1(1)(a), (b), (c), 3(3) and 3(6) together, it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit. The plaintiff had failed to do so and the subsequent affidavits filed before the final hearing also did nothing to remedy the earlier inadequacies as the affidavits did not correctly state the amount of the advance nor show at what rate interest had been calculated. Hence, the plaintiffs application was dismissed. The learned judge however added at p 615A–C as follows:

> … it is a well-established rule of construction that unless the context specifically so excludes, words in the singular must include the plural. It is to be noted that O 83 r 3(3) gives the court the power to dispense with the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date (eg, for non-service) and at least one further affidavit is always required to state the total amount due on the date of the order.
>
> Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant.

[33] The learned judge also rejected the contention that if all the statutory particulars are not contained in the very first affidavit filed in support of the originating summons, there is a 'fundamental breach' as the concept of 'fundamental breach' is one peculiar to non-performance of obligations which go to the root of a contract. The learned judge was not sure how appropriate it was in that context and did not think that *Kimden Housing Development Sdn Bhd* supported the proposition advanced for the defendant before his Lordship.

[34] Next, the plaintiffs affidavit in *Zainal Abidin bin Kassim*, only stated the amount of interest and the total amount outstanding under the charge but did not provide any particulars on the amount of repayments and instalments in arrears. In dismissing the plaintiffs application for an order for sale, Mohd Hishamudin J held that there were serious omissions prejudicial to the defendants.

[35] In *L & L properties Sdn Bhd* Clement Skinner J held, inter alia, that the plaintiffs non-compliance with O 83 r 3(3) did not afford the defendant the opportunity to determine the exact sum to pay and the court could not with any measure of confidence say the total amount due to the plaintiff. That resulted in the dismissal of the plaintiffs application for an order for sale.

[36] A similar conclusion was arrived at by the learned judge in *William Tan Enterprise Sdn Bhd* where the plaintiff has not complied with O 83 r 3(3).

[37] Reverting to the facts before me, it is to be noted that the plaintiffs first affidavit in support stated in para 13 the amount of indebtedness as at 8 October 2003 was RM257,904.07, with further interest at 3.5%pa above the base lending rate of 6% p.a. calculated on a daily basis from 9 October 2003 to the date of realisation, as specified in the plaintiffs certificate of indebtedness. Paragraph 3 of plaintiff's affidavit further stated that as at 26 November 2004, ie the date the order for sale was made, the outstanding sum was RM261,932.70, as evidenced in the plaintiffs certificate of indebtedness.

[38] In my view, these certificates of indebtedness have special legal implications because the defendants have expressly agreed vide cl 66 of the annexure to the charge that such certificates shall be binding and conclusive evidence against the defendants as chargers for whatever purpose including in a court of law: (see eg *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 per Raja Azlan Shah CJ (Malaya) (now HRH Sultan of Perak)). Indeed, it could not be otherwise, as the defendants have not by their affidavit averred anything to the contrary at all.

[39] There can be no doubt that the plaintiff has put before the court the correct amount. The defendants have not shown any iota of prejudice at all. In the circumstances, I am more inclined to the view of Mahadev Shankar J in *Ibrahim bin Othman* to the effect that the court has the power to dispense with some omission to fulfil the rules to the letter.

[40] In *Chong Keat Realty Sdn Bhd* an order for sale has been made against the defendant. An application by the defendant to set aside the order for sale had been dismissed. On appeal, at p 539, the Court of Appeal speaking through Gopal Sri Ram JCA:

(1) rejected the defendant's only contention that the order for sale was invalid because the plaintiffs affidavit in support did not state the amount due as at the date on which the court was moved for an order for sale and has run foul of O 83 r 3;

(2) declared as obiter the earlier decision of the same court in *Diamond Peak Sdn Bhd v United Merchant Finance Bhd* [2003] 2 MLJ 346 in relation to the setting aside of an order for sale on ground of the chargee's failure to observe the mandatory requirements of O 83 r 3;

(3) disallowed a litigant to be in a position to abuse a rule of court, oppress his opponent and thereby occasion an injustice;

(4) reaffirmed the observations of the same court in *Mokhtar bin Amin v Mohamed Moktar bin Omar* to the effect that:

(1) a rule of court, like any other provision, may be the subject of an abuse and it is the function and duty of the courts to be ever vigilant against this; and

(2) the modern approach towards procedural irregularities and the interpretation of what are usually considered to be mandatory or directory provisions is one of greater flexibility than that adopted heretofore; and

(5) adopted the principle enunciated by Lord Woolf MR in *R v Immigration Tribunal; ex parte Jeyeanthan* [1999] 3 All ER 231 that non-compliance with procedural requirements should not be treated as invalidating an action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.

[41] This modern approach has found statutory expression in our O 1A and O 2 r 3 as alluded to above and I would not risk any repetition here except to add that the defendants have at all time been acutely aware of the undisputed factual background including the outstanding sum and the interest as stated in the plaintiffs affidavits which have provided most of the essential statutory particulars, thereby occasioning no prejudice nor any substantial miscarriage of justice to the defendants.

CONCLUSION

[42] For reasons abovestated, I am unable to find any merit in the defendants' application in encl (17) which is hereby dismissed with costs.

Application dismissed.

Reported by Peter Ling